STATE OF MICHIGAN

COURT OF APPEALS

EDWARD MORGAN, Plaintiff-Appellant,	UNPUBLISHED April 14, 2005
v	No. 253789 Kalamazoo Circuit Court
JAMES LAROY and LUANN LAROY, Defendants-Appellees.	LC No. D03-000201 NO

Before: Judges Neff, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals the court's grant of summary disposition dismissing his premises liability action brought as a result of the injuries he sustained when he slipped and fell on snow-covered ice on defendants' walkway. The court found that defendants owed plaintiff no duty because the hazard was open and obvious and not effectively unavoidable. We find that the condition was not open and obvious and, therefore, do not reach the question of avoidability. We reverse the court's order.

Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.1116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court must consider all pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

Plaintiff visited defendants' home for an appointment for the purpose of selling insurance. When he arrived, he parked in the driveway, entered the open garage, and knocked on the interior door. He did not encounter any snow or ice during the few steps from his car to the garage. Defendants welcomed him and he entered through the interior door.

Defendants' home had two other entry points. There was a front door that guests rarely used. There was a side door in close proximity to the interior garage door and both were connected to opposite ends of a breezeway. Guests typically used the side door, which opened to an outdoor walkway paved with patio blocks.

After the meeting, plaintiff exited through the side door. He stated that Mrs. LaRoy indicated to him that he could exit through the side door and directed him that way. Her husband in his deposition stated that she was upset that plaintiff entered through the interior garage door, where there is no doorbell. At no point were her feelings communicated to plaintiff, however.

The weather was cold and during the preceding week there had been significant snow accumulation. The snow outside the side door was fresh in the sense that one could leave a footprint in it or scrape a snowball out of it. Plaintiff took eight to ten steps through the snow and past the one or two steps down onto the walkway and then slipped and fell. His right foot twisted behind him. Plaintiff described his speed as a normal walking gait. He did not see any ice, but he felt with his hands cold, hard ice that was not wet when he was getting up. Plaintiff did not see the ice. He only saw snow. He walked very cautiously without incident over more snow-covered ice to his car. He noticed swelling when he returned home and sought medical attention, which revealed two bone fractures in his foot.

Principles of invitee law determine whether defendants owed plaintiff a duty of care. Plaintiff was an invitee because he was on defendants' premises for the commercial purpose of selling insurance. See e.g., *Kosmalski v St. John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). Generally, a premises possessor owes invitees a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not extend to dangers that are open and obvious, unless there exist special aspects of an open and obvious condition that create an unreasonable risk of harm, in which case the premises possessor has a duty to take reasonable steps to protect invitees from the risk. *Id.* at 516-517. "'[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee'" unless the risk of harm is unreasonable despite being obvious or known to the invitee. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 613; 537 NW2d 185 (1995) (quoting *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)). "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002) (quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993)).

The role of judge and jury with respect to the open and obvious analysis in cases involving ice and snow has been developed in a long line of case law. According to the Supreme Court in *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732(1975):

> [W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. . . . As such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. [*Quinlivan, supra* at 261.]

The Court recently by implication affirmed that accumulation of snow and ice is not open and obvious as a matter of law. In *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), the Court stated the following:

> [I]n the context of an accumulation of snow and ice, *Lugo* means that, *when such an accumulation is 'open and obvious,'* a premises possessor must 'take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard of injury to [plaintiff]' only if there is some 'special aspect' that makes such accumulation 'unreasonably dangerous.' [Emphasis added.]

The emphasized language indicates that not all accumulation of snow and ice is open and obvious. See also *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 106, 108; 689 NW2d 737 (2004) (holding that summary disposition was improper because reasonable minds could disagree as to whether black ice under a coating of snow was open and obvious). Indeed, in *Mann* the Court refrained from deeming open and obvious the "icy and snow-covered parking lot" upon which the intoxicated plaintiff fell and remanded the case to the trial court. *Mann, supra* at 327, 334. The Court explicitly acknowledged the role of the jury. "[I]n determining whether defendant breached its duty, the fact-finder must decide only whether a reasonably prudent person would have slipped and fallen on the ice and snow in defendant's parking lot, or whether that reasonably prudent person should have been warned by defendant of the dangerous condition" *Id.* at 330. The Court also held that liability hinges on the condition of the premises, not the particular plaintiff. *Id*. at 329. It relied on the objective standard of care of the reasonably prudent person and rejected as irrelevant the intoxication of the plaintiff and the dramshop's knowledge of the intoxication. *Id.* at 329-330.

This Court must therefore ask if a reasonably prudent person in plaintiff's position would have, upon casual inspection, discovered the danger and the risk that defendants' snow-covered walkway presented. We answer this question in the negative. All plaintiff saw was snow. He did not see ice and had no reason to believe that slippery ice was underneath the snow. The trial court's pronouncements on temperature fluctuations and a general knowledge in Michigan that "where there is snow, there is ice" typify the general conclusion rejected in *Quinlivan* and *Mann*. Were it otherwise, then all accumulations of snow and ice would be open and obvious per se, which is not the law in Michigan. Furthermore, one walks more cautiously on visible or otherwise known ice than on snow alone. See *Kenny, supra*, 264 Mich App at 108-109. This phenomenon is apparent in the fact that, after falling, plaintiff gained an awareness of the ice and walked cautiously without incident over the remaining snow-covered ice.

The trial court also erred when it emphasized in its ruling that plaintiff felt the ice as he got back to his feet. The relevant point of time is before falling, not after. This distinction is crucial because it also sets apart other cases in which this Court held that accumulations of snow and ice were open and obvious. In each case, the plaintiff had or should have had advance knowledge of the slippery condition, unlike plaintiff in the present case. In *Perkoviq v Delcor Homes–Lakeshore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002), there "was nothing hidden about the frost or ice on the roof" off of which the plaintiff slipped and fell. In *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002), this Court found that the plaintiff was "a reasonable person who recognized the snowy and icy condition of the [dormitory] steps and the danger the condition presented." Finally, in *Joyce, supra* at 239, the

plaintiff was aware of the slippery sidewalk, repeatedly told the defendant about it, and had slipped on it twice prior to falling.

Defendants cite several unpublished opinions in support of their position. These cases have no precedential effect and, therefore, do not merit comment. MCR 7.215(C)(1). To the extent that they are persuasive authority, many, like the cases distinguished above, relied heavily on the fact that the plaintiff had or should have had advance knowledge of the hazard.

Accordingly, snow-covered ice is not open and obvious as a matter of law. Reasonable minds can disagree on the nature of the hazard that a reasonable person in plaintiff's position would encounter and, concomitantly, on the extent of defendants' duty to that person. A fact-finder and not a court of law must decide those questions. We reverse the trial court's grant of summary disposition.

Because consideration of special aspects of the hazard, such as whether it was effectively unavoidable, is conditioned on a finding that the hazard is open and obvious, we need not reach the question. See *Lugo, supra* at 516-517.

Reversed and remanded for proceedings consistent with this opinion. We do no retain jurisdiction.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Michael J. Talbot